

67 FLRA No. 133

UNITED STATES
DEPARTMENT OF AGRICULTURE
FOREST SERVICE
(Agency)

and

NATIONAL FEDERATION
OF FEDERAL EMPLOYEES
LOCAL 5300
(Union)

0-AR-5000

—
DECISION

August 11, 2014

—
Before the Authority: Carol Waller Pope, Chairman, and
Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

The Union filed a grievance over the Agency's decision to code overtime hours the grievants worked as administratively uncontrollable overtime (AUO) instead of regular overtime under the Fair Labor Standards Act (FLSA).¹ Arbitrator Louis M. Zigman granted the grievance, finding that the Agency violated Articles 18 and 19 of the parties' collective-bargaining agreement (agreement), dated October 25, 2010, the FLSA, and the Code of Federal Regulations when it failed to pay the grievants FLSA overtime for all hours worked in excess of eight hours on the days in question. We must resolve two substantive issues.

First, we must determine whether the award is based on a nonfact because the Union "did not present any testimony or evidence showing that any [grievants] were not paid for the hours they requested to [be] paid for or that management denied paying any [grievant] time-and-a-half in excess of eight hours."² Because the Agency's arguments challenge the Arbitrator's weighing of the evidence, and such challenges do not show that an award is based on a nonfact, the Agency has failed to establish that the award is based on a nonfact.

Second, we must determine whether the award is contrary to law because it awards FLSA overtime when, according to the Agency, the number of overtime hours the grievants worked was not predictable. Because the Arbitrator found that the number of overtime hours was reasonably predictable, and therefore the grievants' supervisor should have scheduled the hours as part of the grievants' administrative workweeks under 5 C.F.R. § 610.121(b)(3), we find that the award is not contrary to law.

II. Background and Arbitrator's Award

The grievants are law enforcement officers (LEOs) at the Angeles National Forest in Arcadia, California. One of the LEOs' primary missions is the eradication of marijuana gardens cultivated in the Forest. The Agency conducts eradications almost exclusively on Fridays on an almost weekly basis between June and October each year.

In planning an eradication, the grievants' supervisor chooses where the pre-mission briefing will occur, and schedules a start time and overtime for the eradication. The LEOs are informed of the plan on the Monday or Tuesday preceding the eradication.

An eradication may take longer than the supervisor anticipated for a number of reasons. For example, the garden may be larger than anticipated, or the LEOs may discover more gardens nearby. All of the LEOs are required to remain on duty until the marijuana plants are removed and buried.

The eradications at issue here occurred on two dates. The grievants' supervisor notified the LEOs responsible for the first eradication of their assignment on the Monday beforehand. He notified the LEOs responsible for the second eradication on the Tuesday beforehand. The grievants worked more than eight hours on both days. The Union filed a grievance when it learned that the grievants' overtime hours were not coded as FLSA overtime, but as AUO or its equivalent.

Section 7(a) of the FLSA provides that "employees are entitled to receive overtime compensation for all hours worked in excess of [forty] hours in a workweek at a rate of one and one-half times their regular rate."³ In comparison, AUO is an annual premium payment that may be made to an employee "in a position in which the hours of duty cannot be controlled administratively, and which requires substantial amounts of irregular, unscheduled overtime duty with the

¹ 29 U.S.C. §§ 201-219.

² Exceptions at 17.

³ *U.S. Dep't of the Navy, Naval Air Station, Corpus Christi, Tex.*, 36 FLRA 935, 938 (1990); *see also* 5 C.F.R. § 550.151.

employee generally being responsible for recognizing, without supervision, circumstances which require the employee to remain on duty.”⁴ AUO is paid “as an appropriate percentage, not less than [ten] percent nor more than [twenty-five] percent, of the rate of basic pay for the position.”⁵ AUO and FLSA overtime are mutually exclusive: when an employee eligible for both works more than eight hours in a day, those hours are either compensated as AUO (if the overtime is irregular, unscheduled work) or FLSA overtime (if the overtime is regularly-scheduled, administratively controllable work).⁶

In considering whether the grievant’s overtime should be compensated as FLSA overtime or AUO, the Arbitrator found that their supervisor decided on the number and names of LEOs needed for these marijuana eradications on the preceding Monday and Tuesday. Thus, the grievants were not given notice of their overtime assignments in advance of their administrative workweeks, which began on Sunday. However, the Arbitrator found that the supervisor “essentially knew that the eradications would be conducted on [the dates in question]; that [the eradications] would be performed – mostly likely – on an overtime basis; and that [the supervisor’s] plans for the eradication were made in advance of the administrative work week.”⁷

The Arbitrator further found that the LEOs worked more than eight hours during every eradication conducted during the year, including the two at issue here. He found that the number of overtime hours necessary for an eradication “did vary” because different conditions existed at different sites.⁸ Nevertheless, he found that the grievants’ supervisor “could have reasonably predicted the time required” for the eradications.⁹ Thus, relying on case law interpreting 5 C.F.R. § 610.121(b)(3), the Arbitrator concluded that the grievants were entitled to FLSA overtime because the Agency could reasonably have predicted the dates and hours of overtime necessary prior to the start of the administrative workweek.

The Agency filed exceptions to the Arbitrator’s award, and the Union filed an opposition to the Agency’s exceptions.

III. Preliminary Issues

- A. We dismiss the Agency’s exceptions that fail to raise recognized grounds for review under § 2425.6(e)(1) of the Authority’s Regulations.

Section 2425.6(e)(1) of the Authority’s Regulations provides that an exception “may be subject to dismissal or denial if: [t]he excepting party fails to raise and support” the grounds listed in § 2425.6(a)-(c), “or otherwise fails to demonstrate a legally recognized basis for setting aside the award.”¹⁰ Thus, an exception that does not raise a recognized ground is subject to dismissal under the Authority’s Regulations.¹¹

The Agency asserts that the award is deficient because: (1) the Arbitrator “failed to find a violation in relation to the accepted issue” in this case;¹² and (2) the Arbitrator “overlook[ed]” Article 6 of the parties’ agreement concerning management rights.¹³ These exceptions fail to raise grounds currently recognized by the Authority,¹⁴ and do not cite any legal authority to support a ground not currently recognized by the Authority.¹⁵ We do not “construe parties’ exceptions as raising grounds that the exceptions do not raise.”¹⁶ Therefore, consistent with § 2425.6(e)(1), we dismiss these exceptions.

- B. We deny the Agency’s exception that fails to support a recognized ground for review under § 2425.6(e)(1) of the Authority’s Regulations.

The Agency also claims that the award fails to draw its essence from the parties’ agreement.¹⁷ In reviewing an arbitrator’s interpretation of a collective-bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector.¹⁸ Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its

⁴ 5 U.S.C. § 5545(c)(2).

⁵ *Id.*

⁶ 5 C.F.R. § 550.501(a)(1); *Alozie v. United States*, 106 Fed. Cl. 765, 766 (2012) (*Alozie*).

⁷ Award at 25.

⁸ *Id.* at 20.

⁹ *Id.* at 23 (internal quotation marks omitted).

¹⁰ 5 C.F.R. § 2425.6(e)(1).

¹¹ *AFGE, Local 1858*, 66 FLRA 942, 943 (2012); *see also AFGE, Local 1738*, 65 FLRA 975, 975 (2011) (Member Beck concurring in the result); *AFGE, Local 738*, 65 FLRA 931, 932 (2011); *AFGE, Local 3955, Council of Prison Locals 33*, 65 FLRA 887, 889 (2011) (Member Beck dissenting in part) (*AFGE, Local 3955*).

¹² Exceptions at 18.

¹³ *Id.* at 13.

¹⁴ *See* 5 C.F.R. § 2425.6(a)-(b).

¹⁵ *See id.* § 2425.6(c).

¹⁶ *AFGE, Local 3955*, 65 FLRA at 889 (Member Beck dissenting in part).

¹⁷ Exceptions Form at 9.

¹⁸ 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998).

essence from the collective-bargaining agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the collective-bargaining agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement.¹⁹

Under § 2425.6(b) of the Authority's Regulations, a party arguing that the award fails to draw its essence from the parties' agreement has an express duty to "explain how, under standards set forth in the decisional law of the Authority or [f]ederal courts," the award is deficient.²⁰ Though the Agency mentions both Articles 18 and 19 in its exceptions, it does not explain how the award fails to draw its essence from the parties' agreement under the standards set forth above. Thus, the Agency fails to support its assertion that the award is deficient on this ground.²¹ Accordingly, we deny this exception under § 2425.6(e) of the Authority's Regulations.²²

IV. Analysis and Conclusions

A. The award is not based on a nonfact.

The Agency argues that the award is based on a nonfact.²³ To establish that an award is based on a nonfact, the appealing party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.²⁴ Disagreement with an arbitrator's evaluation of evidence, including the arbitrator's determination of the weight to be given such evidence, provides no basis for finding the award deficient as a nonfact.²⁵

The Agency claims that the Union "did not present any testimony or evidence showing that any LEO[s] were not paid for the hours they requested to be paid for or that management denied paying any LEO time-and-a-half in excess of eight hours."²⁶ Therefore, according to the Agency, "the [A]rbitrator's award should be overturned as he failed in his analysis

that there was a violation of the collective[-]bargaining agreement or statutory law due to his contradictory finding."²⁷ These arguments disagree with the Arbitrator's evaluation of the evidence, including his determination of the weight to be given such evidence, when he found that "the Union established sufficient proof of a contractual violation when the [Agency] provided AUO compensation instead of FLSA time-and-a-half."²⁸ Accordingly, the Agency's arguments do not provide a basis for finding the award based on a nonfact, and we deny this exception.²⁹

B. The award is not contrary to law.

The Agency also argues that the Arbitrator's award is contrary to law because it awards FLSA overtime when, according to the Agency, the number of overtime hours the grievants worked was not predictable.³⁰ When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo.³¹ In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law.³² In making that assessment, the Authority defers to the arbitrator's underlying factual findings, unless the excepting party establishes that they are nonfacts.³³ Challenges to an arbitrator's evaluation of the evidence, including determinations as to the weight to be accorded such evidence, do not demonstrate that an award is contrary to law.³⁴

Article 18(4)(a) of the parties' agreement provides that any hours worked in excess of eight per day are overtime hours.³⁵ Article 19(6)(a) states that employees who work more than eight hours per day are entitled to be paid at the applicable overtime rate provided in 5 C.F.R. parts 550 and 551.³⁶ Those provisions of the regulations cover both FLSA overtime and AUO.³⁷

A federal LEO eligible for both AUO and FLSA overtime may recover FLSA overtime only by:

²⁷ *Id.*

²⁸ Award at 19.

²⁹ *NFFE, Local 1968*, 67 FLRA 384, 386 (2014).

³⁰ Exceptions at 11-15.

³¹ See *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)).

³² See *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).

³³ E.g., *U.S. DOJ, U.S. Marshals Serv., Justice Prisoner & Alien Transp. Sys.*, 67 FLRA 19, 22 (2012).

³⁴ *AFGE, Local 331*, 67 FLRA 295, 296 (2014).

³⁵ Award at 8, 11.

³⁶ *Id.*

³⁷ See generally 5 C.F.R. parts 550-551.

¹⁹ *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990).

²⁰ 5 C.F.R. § 2425.6(b); see also *AFGE, Local 1938*, 66 FLRA 741, 744 (2012) (*Local 1938*).

²¹ See, e.g., *Local 1938*, 66 FLRA at 743.

²² See, e.g., *U.S. DOJ, Fed. BOP, Metro. Corr. Ctr., N.Y.C., N.Y.*, 67 FLRA 442, 450 (2014); see also 5 C.F.R. § 2425.6(e)(1).

²³ Exceptions Form at 8.

²⁴ *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993).

²⁵ *U.S. Dep't of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 103 (2012) (*IRS*).

²⁶ Exceptions at 17.

(1) showing that his or her “supervisor scheduled the overtime in advance of the administrative workweek”; or (2) meeting the fact-specific test set out in 5 C.F.R. § 610.121(b)(3).³⁸ Section 610.121(b)(3) provides that an employee is entitled to FLSA overtime if the agency head or a supervisor delegated the power to schedule the employee’s overtime “should have scheduled a period of work as part of the employee’s regularly scheduled administrative workweek and failed to do so.”³⁹ Specifically, an employee must show that the supervisor: (1) “[h]ad knowledge of the specific days and hours of the work requirement in advance of the administrative workweek”; and (2) “had the opportunity to determine which employee had to be scheduled, or rescheduled, to meet the specific days and hours of that work requirement.”⁴⁰

The Agency claims that the Arbitrator incorrectly determined that the grievants’ supervisor had knowledge of the specific days and hours of their work requirement in advance of the administrative workweek, as required by § 610.121(b)(3)(i). It offers two arguments in support of this claim. First, the Agency contends that the grievants’ supervisor did not know the specific days and hours of overtime needed prior to the administrative workweek due to the unique working conditions involved in a marijuana eradication. It argues that, while the grievants’ supervisor “may be able to predict the number of hours it may take to complete a marijuana eradication[,] he cannot ‘look into the future’ and predict the many ‘variables’ that cannot be controlled during the eradication.”⁴¹ In support of this argument, the Agency contends that the “[A]rbitrator incorrectly found that the facts” in this case are “comparable” to those in *Aviles v. United States (Aviles)*.⁴² It claims that whereas the work environment in *Aviles* – a meat processing plant – was “controlled and predictable,” the LEOs’ working environment during a marijuana eradication “is unpredictable.”⁴³ According to the Agency, “LEO[s] might have to deal with growers that might be at the sites or will find [more] fields that need to be eradicated tha[n] were expected.”⁴⁴

Second, the Agency argues that the grievants’ supervisor lacked knowledge of the specific days and hours of overtime prior to the beginning of the administrative workweek because the supervisor had not

yet received staffing information from partner agencies. Specifically, it claims that the grievants’ supervisor “could not complete his scheduling of the marijuana eradications until the other coordinating law enforcement agencies submitted their schedule of employees to help.”⁴⁵ According to the Agency, “[a]ssuming [the grievants’ supervisor] does his scheduling prior to the administrative workweek based on his predictions[,] and then after the fact he receives the schedules from the other coordinating agencies, he may need to adjust his schedule upward or downward.”⁴⁶

These arguments fail to demonstrate that the award is contrary to law. Neither the regulations nor the case law requires that a supervisor know with certainty the exact number of overtime hours prior to the administrative workweek. Rather, they require only that a supervisor be able to “reasonably predict[.]” the hours in question.⁴⁷

Here, the Arbitrator found that, despite some variation in the amount of overtime necessary to complete an eradication, the amount of overtime required to perform the eradications in question *was* reasonably predictable.⁴⁸ With respect to the specific days, the Arbitrator “note[d] that the testimony is undisputed that [the supervisor] essentially knew that the eradications would be conducted on [the dates in question]; [and] that they would be performed – most likely – on an overtime basis.”⁴⁹ Regarding the specific hours, the Arbitrator concluded that the grievants’ supervisor “could have reasonably predicted the time required” for the eradications.⁵⁰ The Agency’s claim that the overtime was not reasonably predictable merely disputes the Arbitrator’s interpretation of the evidence in making this finding.⁵¹ Indeed, in referencing *Aviles*, the Agency does not challenge the Arbitrator’s legal conclusions, but only his interpretation of the facts, claiming that the facts of this case are unlike the facts in *Aviles*.⁵² The Agency’s claim that the grievants’ supervisor may have needed to adjust his scheduling predictions similarly challenges the Arbitrator’s weighing of the evidence in finding that the overtime hours were reasonably predictable. And the Agency has not challenged these factual findings as nonfacts. As noted above, neither the regulations nor the case law requires a supervisor to know with certainty the exact number of overtime hours needed. Accordingly,

³⁸ *Alozie*, 106 Fed. Cl. at 774; *see also* 5 U.S.C. § 5542(a)(1) (providing time-and-a-half compensation for “regular overtime work”); 5 C.F.R. § 550.103 (defining “[r]egular overtime work” as “overtime work that is part of an employee’s regularly scheduled administrative workweek”).

³⁹ 5 C.F.R. § 610.121(b)(3); *see also* *Alozie*, 106 Fed. Cl. at 774.

⁴⁰ 5 C.F.R. § 610.121(b)(3).

⁴¹ Exceptions at 13.

⁴² 151 Ct. Cl. 1 (1960); *see id.* at 11.

⁴³ *Id.*

⁴⁴ *Id.* at 13.

⁴⁵ *Id.*

⁴⁶ *Id.* at 14.

⁴⁷ *Battenfield v. United States*, 648 F.2d 1194, 1196 (9th Cir. 1980); *see also, e.g., Buchan v. United States*, 31 Fed. Cl. 496, 496 (1994) (*Buchan*).

⁴⁸ Award at 23.

⁴⁹ *Id.* at 25.

⁵⁰ *Id.* at 23 (internal quotation marks omitted).

⁵¹ *Cf. Buchan*, 31 Fed. Cl. at 496.

⁵² Exceptions at 11.

we find that the Agency has failed to demonstrate that the award is contrary to law, and we deny this exception.

Finally, the Agency requests that, if we grant its exceptions, we overturn the Arbitrator's allocation of costs and direct the Union to bear the costs of the arbitration.⁵³ Because we dismiss, in part, and deny, in part, the Agency's exceptions, we need not reach this request.

V. Decision

We dismiss, in part, and deny, in part, the Agency's exceptions.

⁵³ Exceptions at 18.